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No. 169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

DIATOMITE CORPORATION OF AMERICA,

Petitioner,

LEHIGH PORTLAND CEMENT CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented.

Did the United States Court of Appeals for the Fifth Circuit so far depart from the accepted and usual course of judicial proceedings, or so far sanction such a departure by the trial court, as to call for an exercise of this court's power of supervision?

Statement of Case.

Respondent cannot accept petitioner's statement of the case. It is inaccurate and misleading.

In February, 1955, Ormond Plantations, Inc., a Florida corporation and petitioner's assignor, owned approximately 2,900 acres of land in Volusia County, Florida. This

land was adjacent to property owned by Lehigh Portland Cement Company, respondent herein. The president of Ormond was one Harold G. Aron.

On February 19, 1955, Ormond, for valuable consideration, granted an option to purchase the above-mentioned property to John C. Shumberger, Jr., and his assigns (R. 18). Mr. Shumberger was an employee of respondent. The focal point of this litigation derives from the last paragraph of the option agreement, which reads:

> "It is understood that there is a possibility that the optionee and/or purchaser of the property will not *require* title to all of the land involved in the tract herein described and said optionee and/or purchaser does hereby give Mr. Harold Aron, and/or his assigns, the right and privilege to purchase any portion of the land herein described that they do not *desire* to retain at the price of One Hundred ($100.00) Dollars per acre. This privilege shall be given by the optionee and/or purchaser to the said Mr. Harold Aron and/or his assigns by registered mail not later than the 15th day of September, A. D., 1956, c/o Louis Ossinsky, Sr., Esq., 411 Main Street, Daytona Beach, Florida, describing the property which the optionee and/or purchaser does not *desire* to retain and, upon receipt of said notice, said Harold Aron and/or his assigns shall exercise said option to purchase said land, as herein granted, within sixty (60) days thereafter by registered mail, addressed to the said John C. Shumberger, Jr., at 31 South Hall Street, Allentown, Pennsylvania, or at the last known Post Office address of the said optionee and/or purchaser, and said transaction shall be consummated at the office of Messrs. Horn & Ossinsky, 411 Main Street, Daytona Beach, Florida, by noon on the 15th day of December, A. D., 1956, and delivering the purchase price simultaneously with delivery of a good and sufficient warranty deed conveying said real property" (emphasis added) (R. 20).

By letter dated March 10, 1955, Mr. Shumberger gave notice to Ormond of his election to exercise his option (R. 24). Accordingly, and after payment of the requisite price, a warranty deed to the property was delivered to Mr. Shumberger on March 15, 1955 (R. 25).

On August 15, 1956, Mr. Aron wrote Mr. Shumberger. He requested that the "notice" provided for on page three of the option contract be sent to him at a certain address in New York City. Mr. Aron's letter did *not*, contrary to petitioner's statement of the case, request "that the respondent furnish notice of what land did not contain sufficient quantities of coquina rock and shell to make the mining of them economically feasible so that Ormond Plantations, Inc., could exercise its re-purchase option". Mr. Shumberger replied to Mr. Aron on August 31, 1956. He advised Mr. Aron that title to the property was vested in Lehigh and that Lehigh desired to retain all the land purchased (R. 30).

Thereafter, on February 25, 1958, Ormond and Mr. Aron assigned to petitioner, Diatomite Corporation of America, a Maryland corporation, all rights which they had under the option contract (R. 11). Petitioner filed a complaint for declaratory judgment and other relief on March 24, 1958 in the United States District Court for the Southern District of Florida, Miami Division. Notice to dismiss the complaint for failure to state a cause of action was filed by respondent (R. 31). On May 5, 1958 the Court entered an order granting the motion to dismiss with prejudice (R. 32).

The United States Court of Appeals for the Fifth Circuit had the case before it on briefs and oral argument. On April 1, 1959 that Court affirmed the trial court (Pet. A. 1-4). Petition for rehearing was denied on April 29, 1959 (Pet. A. 4).

Argument.

The petition does not set forth any valid reasons why this court should, in its discretion, grant certiorari in this case. The following questions are raised by the petition on page 3:

> 1. Did the United States Court of Appeals fail to take cognizance of facts patent on the face of the record and fail to apply legal principles governing the construction or interpretation of written contract?
>
> 2. Did the United States Court of Appeals and the Court of first instance depart from the judicial norm as expressed in Rule 15(a) of the Federal Rules of Civil Procedure and Federal Opinions interpreting and applying the rule?

Apparently recognizing that these questions, on their face, do not come within the scope of Rule 19 of the Supreme Court Rules, petitioner attempts to bring this case within the requirements of that rule by claiming that the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of its power of supervision by the United States Supreme Court.* The two questions raised by the petition will be considered separately below.

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*The petition also alleges that the decision of the Court of Appeals is in conflict with a decision of the Court of Appeals for the Second Circuit on the same matter (Pet. 6), but no Second Circuit decisions are even cited.

I.

The Court of Appeals did not depart from the accepted and usual course of judicial proceedings in construing the contract involved in this case.

This is, essentially and basically private litigation between two parties over the meaning and interpretation of a contract under Florida law. This is made evident by the clear statement of the basic issue on pages 6 and 7 of the petition:

> "The petitioner is being deprived of its contractual right to repurchase land of great and substantial value located in Volusia County, Florida. The Court of Appeals, in affirming the judgment of the court of first instance, as it appears to this petitioner from the opinion of the Court of Appeals (R. 38-40), followed the line of least resistance and adopted the unsupported [sic] argument of the respondent to the effect that the contract in question was an unambiguous contract and parol evidence was inadmissible to vary its terms."

As the above statement shows, *this is the classic illustration of a case presenting nothing for this Court to review.* A review on writ of certiorari is granted only where there are "special and important reasons therefor." Rule 19, Supreme Court Rules; *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955); *Layne & Bowler, Inc.* v. *Western Well Works Co., Inc.*, 260 U. S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923); *In re Woods*, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125 (1892). It is submitted that the issues in this case are not of sufficient importance to the public to justify the exercise of this court's jurisdiction.

There is no problem of procedure or of constitutional rights here. Petitioner makes no claim that the procedures in the courts below were such as to require this court to exercise its supervisory power over the federal courts. This is not a case like *Offutt* v. *U. S.*, 348 U. S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1955), where this court granted certiorari because of its supervisory authority over the administration of criminal justice in the federal courts and the importance of assuring self-restraint in the exercise by district judges of the summary power for punishing contempt.

Petitioner's argument is simply that the Court of Appeals failed to recognize and apply the authorities cited by petitioner. It is submitted that, even if the Court of Appeals had made an erroneous decision on a question of Florida law, such error would not constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision over the lower federal courts. If certiorari is granted in this case, this court will have no basis for denying it in the myriad future cases which, in essence, will be nothing more than requests for further judicial consideration of possible errors made by lower courts in interpreting state law. As a result, intolerable burdens will be imposed upon this Court to the detriment of cases of general public importance.

Moreover, petitioner does not cite any Florida cases opposed to the decision of the Court of Appeals in this case. Not one of his cases goes to the basic issue: can parol evidence be introduced to vary the terms of the *written contract at issue.* The opinion of the Court of Appeals, in holding that parol evidence may not be introduced in this case, and that the option contract was plain and unambiguous on its face, has merely followed the applicable Florida precedents. See, for example, *Gulf Theatres, Inc.* v. *Guar-*

dian Life Ins. Co. of America, 157 Fla. 428, 26 So. 2d 188 (1946); *McGhee Interests, Inc.* v. *Alexander National Bank*, 102 Fla. 140, 135 So. 545 (1931); *Ramey* v. *Koons*, 230 F. 2d 802 (5th Cir. 1956) (applying Florida law). As this court said in *Propper* v. *Clark*, 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949):

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable" (337 U. S. 486).

II.

The Court of Appeals did not depart from the accepted and usual course of judicial proceedings when it affirmed the dismissal of petitioner's complaint by the District Court.

Petitioner's second argument is that he should have been given leave to amend the complaint so as to state a good cause of action for fraud and deceit. Rule 15(a) of the Federal Rules of Civil Procedure provides as follows:

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10

days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

As a study of the record shows, petitioner never moved in the District Court for leave to amend, nor did he attempt to have the District Court judgment vacated so that he could move for leave to amend. He first raised the issue in his brief in the Court of Appeals. Under these circumstances, the Court of Appeals was clearly correct in refusing to remand the case to the District Court. To permit litigants to raise for the first time in the appellate courts issues which should have been raised in the trial court would make a shambles of the judicial process. *Knox* v. *First Security Bank of Utah*, 206 F. 2d 823 (10th Cir. 1953); *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93 (3d Cir. 1951); cert. den. 342 U. S. 812, 72 S. Ct. 25, 96 L. Ed. 614 (1951); *U. S.* v. *Newbury Manufacturing Co*, 123 F. 2d 453 (1st Cir. 1941). See also, 3 *Moore's Federal Practice*, Sections 15.08, 15.10 and 15.11.

The two cases cited on page 15 of the petition, *Hirshhorn* v. *Mine Safety Appliance Co.*, 101 F. Supp. 549 (W. D. Pa. 1951) and *Snyder* v. *Dravo Corp.*, 6 F. R. D. 546 (W. D. Pa. 1947), are not in point since in both the motions to amend were properly and timely made in the trial court.

Petitioner was not prevented from making the proper motions in the District Court. Although the right to amend a pleading is foreclosed by entry of judgment in the trial court, a party may make a motion to alter or amend the judgment within ten days after entry of the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. And Rule 60 permits a party to make a motion for relief from the operation of a judgment within a reasonable time after entry for any reason justifying such relief. Rule 60 also

states that "the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

In any event, since the granting of a motion for leave to amend is within the discretion of the trial court and the Court of Appeals has determined not to remand for consideration of an issue raised so untimely, the question is not one which this Court should grant certiorari to review. See *Moor* v. *Texas & N. O. R. Co.*, 297 U. S. 101, 56 S. Ct. 372, 80 L. Ed. 509 (1936).

Conclusion.

The Petition for Writ of Certiorari does not present any reasons why this Court should exercise its discretion in granting review of the decision of the Court of Appeals below. It reveals no departure by the lower court from the accepted and usual course of judicial proceedings, and raises no substantial questions of importance to the public. Therefore, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

The undersigned, HARRY H. MITCHELL, one of the attorneys for the Respondent in the above and foregoing Brief for Respondent in Opposition, does hereby certify that a copy of said Brief was served by United States Air Mail, under Rule 33 of the Rules of the United States Supreme Court, on the ..... day of July, 1959, by depositing a copy thereof in a United States mail box with air mail postage prepaid, addressed to Mr. Walter Humkey, 401 Industrial National Bank Building, Miami 32, Florida, the counsel of record for the Petitioner.

.....

HARRY H. MITCHELL.